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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, *et al.*

EXCEPTION OF THE QUECHAN INDIAN TRIBE TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER AND SUPPORTING MEMORANDUM

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The Quechan Indian Tribe respectfully excepts to the Report and Recommendation (dated July 28, 1999) of Special Master Frank J. McGarr, as follows:

The Report and Recommendation erroneously concludes that collateral estoppel precludes the United States and the Quechan Tribe from seeking an adjudication of the boundaries and attendant water rights of lands identified as part of the Tribe's reservation by secretarial order.

MASON D. MORISSET, Counsel of Record
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December 20, 1999

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MEMORANDUM FOR THE QUECHAN INDIAN TRIBE IN SUPPORT OF ITS EXCEPTION TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

1 INTRODUCTION

This is an original-jurisdiction case adjudicating water rights primarily among sovereigns.[1] On July 28, 1999, Special Master Frank McGarr concluded, without citation to authority, that the Quechan Tribe of Indians (Tribe) and the United States are summarily precluded from seeking a final determination[2] of the boundaries of the Tribe's Reservation, including water rights attached to lands identified as being within the Tribe's

1. "The Judicial Power shall extend . . . to Controversies between two or more States. . . . In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2. *See also* 28 U.S.C. § 1251(a).

2. "Final determination" are words of art in the context of this original action. The Court's 1979 supplemental decree in *Arizona v. California* specified that the quantities of water allocated to the Fort Yuma Reservation would continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundary of the Fort Yuma Reservation is finally determined. 439 U.S. at 421.

In *Arizona v. California*, 460 U.S. 605, 636 (1983), the Court ruled that a decision of the Secretary of the Interior in 1978 did not constitute a final determination of the Fort Yuma Reservation boundary as envisioned by the 1979 supplemental decree. Then, on October 10, 1989, the Court issued the following order designed to effect a final determination of the long-disputed Reservation boundary: "The motion of the state parties to reopen the decree to determine disputed boundary claims with respect to the Fort Majave [sic], Colorado River and Fort Yuma Indian Reservations is granted. Justice Marshall took no part in the consideration of this motion." *Arizona v. California*, 493 U.S. 886 (1989).

reservation by secretarial order.[3] The Special Master based his conclusion on a stipulation between the United States and the Tribe made in a case before the Court of Claims.[4] Report and Recommendation at 6; *see also* Order No. 4 (Sept. 6, 1991).[5] His conclusion denies the Tribe substantial land and water reserved to them by the United States, and it does so in a summary fashion, without the chance for the Tribe to present its case. The Special Master's conclusion violates well settled precedent requiring that an issue be necessarily decided by a court before it is granted preclusive effect, especially in actions, such as this one, by third parties.

2 STATEMENT

A brief background of the Quechan people and the Fort Yuma Reservation is helpful to understanding the issues involved here.[6] The present-day Quechan Tribe is the successor-in-interest to the historic Yuma or Quechan people. The historical Indian name is "Kwatca'n," or Quechan; the name "Yuma" is

3. This phase of this long running case is usually referred to as *Arizona III*. *Arizona III* involves disputed boundary claims relating to three Indian reservations: Fort Mojave, Colorado River and Fort Yuma (Quechan). The Fort Mojave and Colorado River reservation disputes have been settled by stipulation and agreement of the respective parties. *See* Appendices 3 and 4 to report of Special Master McGarr (July 28, 1999).

4. *See* footnote 15, *infra*.

5. Motions for reconsideration were denied by Orders No. 5 (Jan. 20, 1992); No. 7 (May 15, 1992); No. 13 (Apr. 13, 1993).

6. This litigation began in 1952 when the State of Arizona invoked the original jurisdiction of this Court by filing a complaint against the State of California and several of its public agencies. Nevada, New Mexico and Utah intervened or were joined later. The United States intervened on behalf of federal establishments, including five Indian tribes. 344 U.S. 919 (1953). The subsequent procedural history, which has resulted in multiple reported and unreported decisions, is summarized in Special Master McGarr's Report and Recommendation. A detailed discussion of the Quechan Tribe's boundary land claims is contained in the February 22, 1982, Report of Special Master Tuttle at 62, 239-254.

the English equivalent. *Quechan Tribe of the Fort Yuma Reservation v. United States*, 8 Ind. Cl. Comm. 111, 116 (1959). The Quechan people were first identified by Euroamericans in 1700 by Father Kino, a Jesuit priest and explorer. He noted that they inhabited areas in the Gila River Valley and at the confluence of the Gila and Colorado Rivers. This area has been the center of their territory ever since, and is where they now have a reservation. Other Jesuit priests noted the presence of Quechan Indians in this area during additional visits in the 1700's, and the Quechan Indians figure prominently in the diaries of these journeys concerning fording the Colorado River and establishment of missions near what is now known as Pilot Knob. Anthropological evidence establishes that the Quechan Indians of the Fort Yuma Reservation have been identified from aboriginal times. *Id.* at 117.

Although the United States acquired sovereignty over the land occupied by the Quechan Indians by the Treaty of Guadalupe Hidalgo in 1848, the Quechan's right of occupancy continued after the sovereignty of the United States and the Indian right of occupancy became legally recognizable under the long-established Indian policy of the United States. 8 Ind. Cl. Comm. at 118; *see also United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 346 (1941).

Following increased pressure on the aboriginal way of life by the influx of Euroamericans into the territory, Congress established the Colorado River Reservation in 1865. Act of March 3, 1865 (13 Stat. 559). The Quechan Indians refused to move to that reservation, as it was remote from their aboriginal lands. As increased settlement and trade took place, the United States finally established the Fort Yuma Reservation on January 9, 1884, for the Quechan at the current site. Executive Order, President Chester A. Arthur (Jan. 9, 1884). 1 Charles J. Kappler, *Indian Affairs, Laws and Treaties* at 832 (1904). The reservation is located straddling the Colorado River in Southwestern Arizona and Southeastern California. *See* Locator Maps 1 and 2, Appendices D and E hereto.

The present-day Quechan Tribe of the Fort Yuma Reservation is a federally recognized tribe of American Indians with a constitution and bylaws duly adopted by the Tribe and originally approved by the Secretary of Interior on December 18, 1936, pursuant to the Indian Reorganization Act. Act of June 18, 1934 (25 U.S.C. §§ 476-494). The present-day Tribe has been determined the successor to the rights of the historical Yuma or Quechan tribe. 8 Ind. Cl. Comm. 111, 143 (1959).

As the present-day legal entity that is successor to the aboriginal Quechan Indians, the Quechan Tribe possesses both proprietary and governmental powers within the Fort Yuma Reservation. Pursuant to this authority, the tribal government, which consists of an elected council and president, is responsible for the health and welfare of its people and for the maintenance and development of the Reservation as a homeland for the Quechan people. Obviously, due to the desert climate, water is essential to the continued well-being of the Quechan people and to their economic self-sufficiency and commercial development.

From the time of their first contact with Euroamericans, the Quechans, like other tribes along the lower Colorado and Gila Rivers, practiced agriculture and raised crops of corn, beans, pumpkin, and melons. Anthropologists have estimated that the Quechan Indians obtained at least half of their food from agriculture. 8 Ind. Cl. Comm. at 119.

Today the Quechan Tribe continues to use water for agricultural purposes on the Reservation, producing crops that are commercially marketed. In addition, water is used for governmental and proprietary purposes, including domestic use and business activities. This case fundamentally affects the Tribe's rights to portions of its original Reservation and attendant water rights.

2.1 *The 1893 Agreement for Allotment and Irrigation of the Fort Yuma Reservation.*

In 1893, the Quechan Indians and the Commissioner of Indian Affairs negotiated an Agreement (the 1893 Agreement) to provide for the building of an irrigation canal along a right-of-way on the Reservation, which had been authorized earlier.[7] The 1893 Agreement was ratified by Congress by the Act of August 15, 1894, 28 Stat. 286, 332.

The 1893 Agreement provided for the cession of approximately 25,000 acres of lands of the Fort Yuma Reservation.

> The said Yuma Indians, *upon the conditions hereinafter expressed,* do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of county in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows . . .

Appendix C, art. I (emphasis added). As noted, the cession was expressly conditioned upon performance by the United States and the canal company of certain conditions.

The numerous specific provisions to be met before the cession was effective included: (a) construction of a canal within three years, (b) allotment of irrigated lands to tribal members, (c) sale of certain lands to raise revenues to assist in the construction of the canal, and (d) opening of certain lands to the public domain. A provision for delivery of one acre-foot of free water to each Indian male adult over a ten-year period for crop irrigation was added by the ratifying legislation (*see* "1893 Agreement and Approving Statute, 28 Stat. 332," set forth in Appendix C hereto).

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7. The Act of February 15, 1893, 27 Stat. 420, permitted an irrigation company a right-of-way across the Fort Yuma Indian Reservation for the purpose of constructing a canal.

These conditions were never performed. The canal was never constructed. In 1898 the United States evicted the canal company from the Reservation because of its failure to comply with the 1893 Agreement.[8] Portions of the irrigable lands were never identified for sale to non-Indians and, as a result, the Quechan Indians never received revenue from the sale. They did not receive allotments or free water for ten years. The lands not irrigated were never opened to public settlement. Opinion of the Solicitor, 86 I.D. 1 (1978). Thus the Agreement and the statute approving it were not complied with. Subsequent events served to complicate the status of the lands involved in the 1893 Agreement.

2.2 *Subsequent Events Concerning Reservation Land.*

Later, early in the twentieth century, an irrigation system was placed on portions of the Fort Yuma Reservation. That system, a part of the Yuma Project, was authorized by the Indian Appropriation Act of 1904, 32 Stat. 388 (as amended 43 U.S.C. §§ 371, *et seq.*) and 33 Stat. 189, 224.[9] Pursuant to the 1904 Act, approximately 6,500 acres of the lands on the Fort Yuma Reservation located adjacent to the Colorado River and the diversion canal were sold to non-Indians and water was promptly delivered to that non-Indian unit (known as the Bard unit) in March 1910.[10] By 1915, a distribution system to the Indian allotments on the Fort Yuma Reservation, located to the west of the non-Indian Bard unit and dependent upon the facilities of the Bard unit, was under construction. By 1917, two thousand acres of Indian lands were

8. Letter, Commissioner of Indian Affairs W.A. Jones to Secretary of the Interior Hitchcock (July 2, 1902).

9. The Reclamation Law of 1902, 32 Stat. 388 (as amended 43 U.S.C. §§ 371 *et seq.*), authorized federal monies to irrigate public lands. A separate authorization was required for the irrigation of Indian lands and that separate authorization was obtained for both the Fort Yuma Reservation and the Colorado River Reservation in 1904.

10. United States Reclamation Service, *Ninth Annual Report* (1909-1910) at 78.

being irrigated.[11] An additional five thousand acres of Indian lands were subsequently irrigated. The provisions of the 1904 Act bore little resemblance to the terms of the 1893 Agreement and enabling statute. Nevertheless, the 1904 Act allowed some reservation lands to be removed from tribal ownership.

The second major development was the construction of the All-American Canal. The Canal originated in the late 1920's as a private undertaking of the Imperial Irrigation District of California. Over the years, the Bureau of Indian Affairs and the Bureau of Reclamation reviewed different proposed locations for the canal. The Bureau of Indian Affairs requested rights-of-way from the Quechan Indians to permit the construction of the All-American Canal across portions of the Fort Yuma Reservation.[12] In 1935, the Commissioner of Indian Affairs advised the Bureau of Reclamation that any right-of-way would have to comply with the terms of the recently enacted Indian Reorganization Act of June 18, 1934, 48 Stat. 984. This advice was consistent with the view that the conditions in the 1893 Agreement had not been met and, therefore, the lands in question were still held in trust for the Tribe.

The third development was the 1936 opinion of the Solicitor of the Department of the Interior, Nathan B. Margold. He opined that the All-American Canal lands had in fact been ceded to the United States under the 1893 Agreement.[13] This eliminated the requirement for a right-of-

11. Report on the Irrigation of Yuma Reservation Land to the Commissioner of Indian Affairs (March 9, 1918).

12. For example, General Land Office Commissioner Fred W. Johnson stated on July 5, 1934, to the Commission of Indian Affairs, "since the right-of-way involves Indian lands and is applied for under Sec. 13 of the Act of June 25, 1910, 36 Stat. 855, the administration of which Act is under the jurisdiction of the Office of Indian Affairs, I am forwarding the map showing the right-of-way for your consideration and appropriate administration."

13. *Yuma Reservation–Title to Lands*, I Ops. Sol. 596 (January 8, 1936).

way. Solicitor Margold concluded that while the express conditions stated in the 1893 Agreement had not occurred, the cession of the non-irrigable lands (required to construct the All-American Canal) nevertheless occurred in 1893, because the conditions in the 1893 Agreement were not "material." The opinion concluded that the non-irrigable lands immediately vested in the United States in 1893 and remained there, notwithstanding the failure of virtually every condition in the 1893 Agreement. This conclusion was completely inconsistent with treatment of the subject land as part of the Reservation.

This opinion was later reversed by the Department of the Interior in 1978, as will be explained below. Before it was reversed, the 1936 Solicitor's Opinion dramatically changed the administration of the boundary lands: it essentially transferred jurisdiction from the Bureau of Indian Affairs to the Bureau of Reclamation. The 1936 opinion operated to terminate a previously uninterrupted pattern of Bureau of Indian Affairs supervision over the non-irrigated lands. More importantly, however, the 1936 opinion gave the Bureau of Reclamation the green light to build the All-American Canal without the consent of the Quechan Indians.

The fourth relevant development was the filing of an action before the Indian Claims Commission[14] in 1951 that claimed compensation from the United States concerning the non-

14. In 1946 Congress established the Indian Claims Commission to hear all Indian claims accruing before 1946, including "claims in law or equity arising under the Constitution" and claims arising from the lack of "fair and honorable dealing" by the United States. Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70 *et seq.* (1976). The Commission heard claims brought by tribes for wrongful taking of lands, inadequate compensation for lands, damage to lands, etc. Congress subsequently transferred jurisdiction over these cases to the Court of Claims.

irrigable lands. Alleging alternative damage theories,[15] the Tribe initially contended that the United States took the Reservation lands in 1893 and did not adequately compensate the Tribe. Other claims contended that the United States, in negotiating and implementing the 1893 Agreement, violated the fair and honorable dealing standard established by the Indian Claims Commission Act. The Tribe's amended 1958 claim also asserted that the 1893 Agreement was never implemented, that beneficial title was still in the Tribe, and that trespass damages for unlawful use of the Reservation lands were therefore required.

The fifth development occurred on December 20, 1978, when Department of Interior Solicitor Leo Krulitz issued an opinion reversing previous Solicitors' opinions concerning the 1893 Agreement. He concluded that, because the Quechan Tribe had ceded its lands conditionally under the 1893 Agreement and those specific conditions were never met, the Tribe's relinquishment of title to the Tribe's non-irrigated lands never took effect. 86 I.D. 1 (1978). That same day, Secretary Andrus issued an order confirming that the boundaries of the Fort Yuma Reservation were consistent with the 1884 executive order creating the Reservation.[16]

2.3 *Subsequent Litigation in This Case.*

On December 21, 1978, the United States moved to modify the 1964 Decree in this case to obtain water for certain Indian "omitted" and "boundary" lands.[17] Though acknowledging that the 1964 Decree (Article II(D)(5)) only provided for subsequent

15. The Tribe filed an amended petition in 1958.

The only reported decision in Docket 320 with respect to the 1893 Agreement is published at 26 Ind. Cl. Comm. 15 (July 21, 1971). This decision also contains a description of the Tribe's alternative claims.

16. Secretarial Determination and Directives of December 20, 1978, *published at* 46 Fed. Reg. 11,372 (Jan. 30, 1981).

17. Motion of the United States for Modification of Decree and Supporting Memorandum 6 (Dec. 21, 1978). The United States sought water for "boundary lands" for which water had not been allocated in the original proceeding and for "omitted lands" that had not been considered to be practicably irrigable in the original proceeding.

adjustment as a result of final boundary determinations on the Colorado River and Fort Mojave Reservations, the United States argued that "fundamental equitable principles require that the same rule apply to the other reservations whose boundaries likewise have been finally determined to include acreage not known to be encompassed in 1964" and that this principle "appears to be agreed on all sides and is, indeed expressly contemplated by the supplemental decree proposed by the state parties."[18] Consequently, the United States sought to increase the Fort Yuma Reservation's allocation to provide additional water for the practicably irrigable boundary lands. In their response, the state parties argued that there had been no final determination of any of the various boundary disputes and urged the Court to allow a Special Master to address them.[19]

Special Master Tuttle was appointed to hear pending matters. He entertained briefs and argument on several threshold legal issues, including whether the boundaries of the reservations had been "finally determined" within the meaning of the 1964 and 1979 decrees. The United States and the Tribes contended that certain secretarial orders had "finally determined" the boundaries on all five mainstream reservations. The Special Master accepted the contentions of the United States and the tribes and declined to review the validity of the various boundary determinations.[20] The state parties sought interlocutory review of that decision by the Court,[21] which was denied. 444 U.S. 1009 (1980).

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18. *Id.* at 12 (emphasis added).

19. Response of the States of Arizona, California, and Nevada, and the Other California Defendants to the Motion of the United States for Modification of Decree at 11, 22-25 (Feb. 14, 1979).

20. Memorandum and Report on Preliminary Issues (Aug. 28, 1979).

21. Motion of the States of Arizona, California, and Nevada and the other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle and for Stay Order; Exceptions; and Opening Brief of Said Parties In Support of Their Motion and Exceptions (Nov. 1979).

Special Master Tuttle's final report reaffirmed his earlier decision on the boundary issues.[22] In their exceptions to that report, the state parties stated their position on the scope of Article II(D)(5):[23]

> Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the state parties have not objected to its application to the other reservations as well. Accordingly, the stipulated Decree of 1979 contains the proviso respecting possible adjustment of water allocations for all five reservations.

Arizona v. California, 439 U.S. 419 (1979).

The Court's decision in *Arizona II*, 460 U.S. 605 (Mar. 30, 1983), explained the effect of the 1979 Decree:

> Our Supplemental Decree of 1979 did not rule on these motions [of the Tribes to intervene] or resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations. . . .

Id. at 634.

After reviewing the merits, the Court rejected the Secretarial orders on the Fort Mojave, Colorado River, and Fort Yuma Reservations as "final determinations" adequate to bind third parties. *Id.* at 636-37. To permit the tribes their day in court to demonstrate irrigable acreage in the event boundary lands were "finally determined" within the standards of *Arizona II*, the 1984 Supplemental Decree revised Article II(D)(5):

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22. Report of Special Master Tuttle at 55.

23. Exceptions of the States of Arizona, California, and Nevada and the Other California Defendants to the Report of Special Master Elbert P. Tuttle; and Brief of Said Parties in Support of Exceptions at 60 n. 29 (May 20, 1982).

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1 (Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

466 U.S. 144, 145 (1984).

2.4 *The Settlement of Indian Claims Commission Docket 320*

In *Arizona II* (March 30, 1983), the Court ruled that while the December 1978 decision of the Secretary addressing the Fort Yuma boundary lands was not a "final determination" required to bind third parties in a water rights claims proceeding, it did clarify the boundary land issue as between the Tribe and the United States. Accordingly, on May 26, 1983, in anticipation of trial in Indian Claims Commission Docket 320 (Docket 320) the United States and the Tribe referenced the 1978 secretarial order in a joint memorandum regarding stipulations. Stipulation 9 provided:[24]

> If the December 20, 1978, Secretarial order is upheld, the proper measure of damages for the portions of the Reservation which were permanently acquired from the Quechan is the fair market value

24. Stipulation 10 explained that the lands that had been permanently acquired from the Reservation were expressly set out by the Secretary in the Federal Register on January 30, 1981, and included the All-American Canal, other interests of the Bureau of Reclamation, and third party leases and rights-of-way had been acquired over the years. "The Secretarial order of December 20 1978 excludes from the recognition of the trust status of the lands within the 1884 exterior boundaries, those lands as to which valid rights were acquired by third parties before or after 1884 and reclamation work projects constructed on the reservation pursuant to statutes after 1884." Those exceptions are described in detail in the secretarial Determination and Directives signed by Secretary Watt on January 30, 1981, and published in 46 Federal Register at 11,372 (Jan. 30, 1981).

> of those portions of the Reservation on the effective dates of the permanent acquisitions. No stipulation is entered into as to the measure of damages for the temporary deprivation of those lands which were reaffirmed by the executive order of December 20, 1978, or of those lands which, after a period of temporary deprivation, were permanentiy acquired.

Prior to the May 26, 1983, trial stipulation, on April 20, 1983, in anticipation of trial commencing June 20, 1983, the Tribe had authorized a final settlement offer. That settlement offer was accepted by the United States on June 15, 1983. On August 9, 1983, the Tribe and the United States entered into a second stipulation, this one for settlement and entry of final judgment. That second stipulation was incorporated by the Court of Claims in its August 9, 1983, judgment.

The August 1983 judgment of the Court provided:

> Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and [sic] any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims or offsets.

Stipulation for Settlement and Entry of Final Judgment (Aug. 9, 1983), Appendix A.

Included in the stipulation as Exhibit 4 and incorporated into the judgment was a confirmation by the United States that settlement of the claims in Docket 320 encompassed both

"claims of the Quechan Tribe for damages for the taking of parts of their Reservation after 1893 and the loss of use of other parts of the Reservation from 1893 to 1978."[25]

Upon entry of the judgment, the Quechan Tribe received $15 million and dismissed with prejudice its claims against the United States. Clearly, the stipulated settlement only involved claims against the United States. Clearly it did *not*, on its face or otherwise, establish reservation boundaries.

Subsequent to the entry of judgment in Docket 320, this Court ruled that:

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1 (Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Arizona v. California, 466 U.S. 144, 145 (1984) (supplemental decree).

It is clear that determination of boundaries was still an issue to be resolved, even after entry of the judgment in Docket 320.

2.5 *The Metropolitan Water District v. United States Proceedings*

In *Arizona II* (March 30, 1983), this Court rejected Special Master Tuttle's "final determination" recommendations and directed the state parties to pursue a federal court action to secure a "final determination" of the boundary lands issues:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United

25. Appendix A (letter of the Department of the Interior, July 27, 1983, Exhibit 4 to the Joint Motion to Stipulate and made a part of the judgment of the Court of Claims).

> States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II, 460 U.S. at 636, 638 (footnotes omitted).

In 1981, *Metropolitan Water District* was filed to litigate the status of all three boundary lands, including the Fort Yuma boundary lands. However, this Court affirmed the Court of Appeals for the Ninth Circuit dismissal of the action for lack of jurisdiction. *California v. United States*, 490 U.S. 920 (1989), *aff'g Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987).

In 1989, in light of the dismissal of *Metropolitan Water District,* the state parties moved to reopen the 1964 Decree in *Arizona I* for the purpose of securing a "final determination" of the three Indian reservation boundary lands. The United States and the tribes did not oppose the state parties' motion and on October 10, 1989, the Court ordered the decree reopened. *Arizona v. California*, 493 U.S. 886 (1989). Proceedings were commenced under the supervision of Special Master Robert McKay, who died in July of 1990, and thereafter, under Special Master Frank McGarr, who, after briefing, issued his opinions of September 6, 1991, January 20, 1992, and his Report and Recommendation of July 28, 1999, from which the Quechan Tribe files this Exception.

Although Special Master Tuttle recommended that an additional 41,347 acre-feet of water be allocated to the Quechan

Tribe for the disputed boundary lands, the Court rejected the recommendation on the grounds that the Reservation boundary had not been finally determined within the meaning of the 1964 Decree. The Court also rejected attempts to determine the boundary in *Metropolitan Water Dist.* This left the matter to determination in this proceeding.

However, Special Master McGarr has erroneously concluded that the final judgment approving the settlement of claims against the United States by the Quechan Tribe in Docket 320 bars adjudication of the Reservation boundary and water rights attached to the boundary lands.[26] According to the Special Master, there is to be no determination of the Reservation boundary. It is that ultimate conclusion to which the Quechan Tribe hereby makes exception.

3 EXCEPTION: COLLATERAL ESTOPPEL DOES NOT PRECLUDE THE ADJUDICATION OF QUECHAN BOUNDARY LANDS AND WATER RIGHTS IN THIS CASE.

The Special Master's conclusion denies the Quechan Tribe a substantial portion of its Reservation and attendant water rights. It seems to foreclose ever determining the boundaries of the Fort Yuma Reservation. His views about the preclusive effect of the stipulated settlement and judgment in Docket 320 are incorrect as a matter of law and are inconsistent with precedent relating to the preclusive effect of consent judgments. His views, if accepted, will mean that the stipulation in Docket 320 bars determination of the Reservation boundary. The two parties to the stipulation in Docket 320, however, do not agree with this reading.

26. These lands total 6107 acres. Report of Special Master Tuttle at 254.

3.1 *According Preclusive Effect to an Unlitigated Stipulation and Consent Judgment in an Action Involving Parties Absent from the Initial Litigation Severely Prejudices the Quechan Tribe, Defeats the Expectations of the Parties, and Misapplies the Doctrine of Collateral Estoppel.*

In litigation to adjudicate the rights of various sovereigns, the Special Master erroneously applied the doctrine of collateral estoppel to bar the United States and the Quechan Tribe from obtaining a final determination of one of the remaining outstanding issues in this case.[27] The Special Master's erroneous conclusion misapplies the doctrine of collateral estoppel and defeats the expectations of all parties to this case, which at one time or another, believed that the boundary land dispute at issue here would be finally resolved by adjudication in this proceeding.

At the heart of the doctrine of collateral estoppel is the requirement that the issue sought to be precluded was actually litigated and necessary to a court's adjudication of the matter. As this Court has stated:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue *and directly determined by a court of competent jurisdiction* . . . cannot be disputed in a subsequent suit between the same parties or their privies."

Montana v. United States, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897); emphasis added). The Court has been similarly

27. The Special Master does not state separate findings and conclusions; rather his conclusions are in large part merged into the text of the Report and Recommendation. Consequently, the Tribe's exception relates to the ultimate conclusions hereinafter specified and to all incidental determinations involved in reaching those ultimate conclusions.

unequivocal in defining what it means for an issue to be actually decided. In *Montana* the Court confirmed that in order to preclude an issue previously determined, the Court must find that:

> [T]he "question expressly and definitely presented in this suit is the same *as that definitely and actually litigated and adjudged*" adversely to the Government in state court.

440 U.S. at 157 (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924); emphasis added).

The reason for the "actually litigated" requirement of collateral estoppel is this:

> Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328 (1979) (quoting *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980) (by relieving parties of the "cost and vexation of multiple lawsuits," conserving judicial resources, and preventing inconsistent decisions, collateral estoppel encourages "reliance on adjudication.").

Although the Court has broadened the application of collateral estoppel,[28] it has not abandoned the "actually litigated" requirement. Indeed, this Court and the Circuit Courts continue to recognize that the "actually adjudicated" requirement remains critical to invocation of the doctrine. In addition, the Court has recognized, where the litigation involves the United States, even where a prior judgment was the result of actual litigation,

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28. *E.g., Blonder-Tongue Laboratories, Inc.*, 402 U.S. 313 (1971) (abandoning requirement of mutuality of parties); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (approving conditionally the offensive use of collateral estoppel by a nonparty to a prior action).

collateral estoppel may not preclude the United States from relitigating the issue. *United States v. Mendoza*, 464 U.S. 154, 162-63 (1984). Of course, here we do not suggest that the United States wants to "relitigate" the issue–since it has never been litigated.

The doctrine of collateral estoppel serves dual purposes. First, the doctrine protects "litigants from the burden of relitigating an identical issue with the same party or his privy." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971). Second, it promotes judicial economy by "preventing needless litigation." *Id.*

Obviously, neither of these purposes are involved here. First, the two litigants in Docket 320 agree that it is not preclusive as to the boundary question and do not bear a "burden of relitigating an identical issue" as between themselves. Second, the question of the extent of the reservations was *never* litigated and there is, thus, no "needless litigation." Any judicial economy with respect to Docket 320 is not affected because it was resolved by a stipulated settlement, not trial. Special Master Tuttle has already determined the amount of additional allocation for the boundary lands. Only the underlying legal questions remain concerning the failure of conditions of the 1893 Agreement and the effect of the 1978 secretarial order. Those issues were not addressed or resolved by the consent judgment in Docket 320. A heavy burden is placed on the sovereign parties by *not* adjudicating a significant and vexatious question.

An examination of the consent judgment entered in Docket 320 shows that the issue of the Reservation boundary and disputed boundary lands was not actually litigated nor decided. To the contrary, prior to trial the parties entered into a stipulated settlement and confirmed it with the following judgment:

> Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred

> thereby from asserting any further rights, claims, or demands against the defendant and [sic] any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

This language sets forth the rule of res judicata–namely, that as between the Quechan Tribe and the United States, each party waives any claim it asserted or could have asserted against each other.[29]

But simply because the Tribe and the United States agreed to never again litigate the subject matter of Docket 320 as between themselves does not foreclose them from seeking to determine the boundary of the Reservation and the water rights associated with the disputed boundary lands. Indeed, the express language of the settlement states that it is "a compromise and settlement and shall not be construed as an admission by either party for purposes of precedent or argument in any other case." Appendix A.

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29. This language was required by 25 U.S.C. § 70u, which provides:

> A final determination against the claimant made and reported in accordance with this act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

The plain language of the settlement bars the United States and the Tribe from relitigating between themselves the historical claims and damages relating to the Fort Yuma Reservation lands at issue in Docket 320. *Nevada v. United States*, 463 U.S. 129 (1983); *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971).

The Docket 320 judgment illustrates why the courts are not inclined, in the absence of express findings of fact, to give preclusive effect to consent judgments. *E.g., Levinson v. United States*, 969 F.2d 2600, 264 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992); *Gall v. South Branch Nat'l Bank of S.D.*, 783 F.2d 125, 127 (8th Cir. 1986); *see also* 18 Moore's Federal Practice (3d ed.) § 132.02 [2][I][I] (1997). The petitions in Docket 320 asserted both taking and trespass damages. Upon trial, the Tribe could have obtained takings damages, implying that title was in the United States. Or, the Tribe could have obtained trespass damages, implying that title remained in the Tribe. The July 27, 1983, letter of the Acting Deputy Assistant Secretary of Indian Affairs approving the Tribe's settlement of Docket 320, incorporated as part of the final judgment, confirms that the settlement of Docket 320 embraced both claims.[30] The settlement was not premised on one theory over the other. Nor can one conclude from the stipulated settlement that Reservation boundaries, land title and water rights were to be affected.

One obvious question is, what could the settlement have been for? This does not appear from the record in the case. The funds paid to dismiss the claims of the Tribe against the United States in Docket 320 could have been for a number of things, including damages for trespass on Indian land, or damages due to the building of the All-American Canal (unlined canals are notoriously damaging to surrounding areas), or damages in the nature of trespass for use of tribal water, or taking of land or water, to name a few. In other words, it could have been for any number of things. However, the Special Master's assumption that it was for the diminishment of the Reservation or the reduction of the Reservation assumes far more than is indicated anywhere on the face of the stipulation or the relevant pleadings in Docket 320. As will be demonstrated in the next section, it

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30. The approval by the Department of Interior dated July 27, 1983, was incorporated by the parties into their July 29, 1983, stipulation and the stipulation in turn was made a part of the settlement order of the court dated August 9, 1983.

does not appear that it was a settlement of the location of Reservation boundaries nor that it was meant to diminish the Reservation nor was it meant as a sale of water rights from the Tribe.

3.2 *Neither the United States nor the Quechan Tribe nor the Other Parties to this Action Understood that the Stipulated Settlement Would Bar a Final Adjudication of the Boundary Lands or Water Rights.*

Collateral estoppel is an equitable doctrine:

> Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it. . . . Its application is controlled by the principles of equity. . . . [F]airness to both parties must be considered when it is applied.

Nations v. Sun Oil Co. (Delaware), 705 F.2d 742, 744-45 (5th Cir.) (on petition for rehearing and suggestion for rehearing en banc), *cert. denied*, 464 U.S. 893 (1983) (quoted in *Jack Faucett Assoc. v. American Tel. & Tel.*, 744 F.2d 118 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (citing multiple authorities). The Fifth Circuit has similarly noted:

> The doctrines [or res judicata and collateral estoppel] must be used . . . not as clubs but as fine instruments that protect the litigant's right to a hearing as well as his adversary and the courts from repetitive litigation.

Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 421 F.2d 1313, 1316 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).

To use the doctrine here to deny the Quechan Tribe a determination of the boundaries of its Reservation would be to use the doctrines as a club to deny the Tribe's right to a hearing. Neither the United States nor the Tribe intended their settlement of Docket 320 to prevent either party from seeking a final determination of Reservation boundaries and the amount of

water that attaches to those lands. The letter of the Tribe's claims attorney confirms that it was in the Tribe's interest to settle the claims encompassed within Docket 320 with the United States in 1983 prior to any judicial review of the 1978 Secretarial Order. Appendix B (letter from Tribal Attorney to Vincent Harvier, President, Quechan Tribal Council (July 6, 1983)).

In the present case, use of extrinsic evidence makes it unmistakably clear that neither the United States nor the Quechan Tribe intended their settlement of Docket 320 to prevent either party from seeking a final determination of the Fort Yuma boundary lands and, of course, a determination of the amount of water that attaches to those boundary lands. On July 6, 1983, the Tribe's claims attorney described to the Quechan Tribal Council the rationale for settlement.

> In 1971 the Quechan Tribe retained me to prepare and prosecute claims for reaffirmation of their 1884 title and for damages in Docket 320. First, I was requested to take whatever action was necessary to obtain for the Tribe a reaffirmation to its title to the reservation as established in 1884. Second, I was to pursue the damage claim which the Quechan Tribe had pending for 20 years against the United States before the Indian Claims Commission, known as Docket 320. As a result, I went to work immediately on both matters, devoting my main efforts, of course, to reaffirming your ownership of the reservation. My efforts were crowned with success in December of 1978, when the Secretary of the Interior issued an order reaffirming that the United States holds title to the lands within the 1884 reservation boundaries in trust for the Quechan Tribe (except those lands to which third parties had acquired title, such as the Bard lands). *The decision allowed us to go forward with the claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893*

and the loss of use of other parts of the reservation from 1893 to 1978.

. . . . .

Mr. Kilpatrick and I analyzed the facts and concluded that we could present persuasive evidence that the Quechan Tribe sustained damages by the loss of the so-called Bard lands, the lands that were taken for levees, the lands taken for the All-American Canal, and the sand and gravel removed from the reservation. We *also developed evidence of loss of rental value from 1893 to 1978 for the restored irrigable farm lands both north and south of the All-American Canal. And we developed evidence of a loss of rental value during the same period for those lands lying along the Colorado River which could and should have been developed for waterfront recreational uses.* We therefore concluded that the evidence would support a judgment of at least $8,000,00.00 and at most $25,000,000.00.

Appendix B (letter dated July 6, 1983, from the Tribal Attorney to Vincent Harvier, President, Quachan Tribal Council; emphasis added).

This letter makes clear that the Tribe was advised that the attempt to confirm their title to disputed lands was "crowned with success" when the Solicitor ruled in their favor in 1978. The letter goes on to note that counsel developed evidence of "loss of rental value from 1893 to 1978" for certain irrigable lands. Counsel concluded that the evidence would support a judgment of at least $8 million and at most $25 million. The final settlement was for $15 million.

The letter of counsel confirms that it was in the Tribe's interest to settle Docket 320 with the United States in 1983 prior to any judicial review of the 1978 secretarial order, because, under the 1978 order, the Tribe could justify a larger dollar settlement based on ongoing trespass damages. If the 1978 order was overruled, then the Tribe would be compelled to seek taking

damages as of 1893, at a time when the Reservation lands were of limited value. The letter clarifies the Tribe's reasons for settlement. It does not contradict the settlement and should be considered by the Court in evaluating the effect of the settlement.[31]

Moreover, the unresolved status of the 1978 secretarial order as of August 1983, as well as the ongoing federal court litigation to determine the boundaries of the Fort Yuma Reservation for water rights purposes, *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), led the United States and the Quechan Tribe to insert in their 1983 settlement the following language: "The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." Appendix A. Neither the United States nor the Tribe intended this settlement to bar a definitive determination of Reservation boundaries or water rights in boundary areas.

The Special Master erroneously concluded that the Docket 320 consent judgment bars the parties to that judgment from seeking an adjudication of the boundaries of the Fort Yuma Reservation here. In the special circumstances of this case, collateral estoppel should not bar resolution of the water rights with respect to the disputed boundary lands because Docket 320 contains no specific findings demonstrating that the status of boundary lands were actually litigated or necessarily decided. Nor does the language of the consent judgment otherwise reveal any intent to bar litigation of the boundary land water rights. An issue is not litigated if it is the subject of a stipulation. *E.g., Sekaquaptewa v. MacDonald*, 575 F.2d 239, 247 (9th Cir. 1978) (parties in previous litigation stipulated to survey lines by stipulating to use of map; challenged boundary was neither actually litigated nor necessarily decided).

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31. Moreover, it does no violence to the parole evidence rule. That is, the description of the Tribe's counsel does not contradict the consent agreement. Rather, it explains the consent agreement.

3.3 *Without Findings and Conclusions, Docket 320 Cannot Have Preclusive Effect.*

Even if the issue of the boundary lands had been litigated, it is well established that consent judgments that lack findings of fact or determinations of issues are not accorded preclusive effect. In *Lawlor v. National Screen Serv.*, 349 U.S. 322 (1955), this Court declined to give collateral estoppel effect to a settlement agreement between the parties then before the Court because the consent judgment was "unaccompanied by findings and hence, did not bind the parties on any issue . . . which might arise in connection with another cause of action." *Id.* at 327. *See also Avondale Shipyards Inc. v. Insured Lloyds*, 786 F.2d 1265, 1272 (5th Cir. 1986) (judgments based on parties' stipulation are not entitled to collateral estoppel effect in a later action); *United States v. California Portland Cement Co.*, 413 F.2d 161, 163 (9th Cir. 1969) (same).

Similarly, in *United States v. International Bldg. Co.*, 345 U.S. 502 (1953), this Court stated:

> Certainly the judgments entered are res judicata of the tax claims for the years 1933, 1938, and 1939, whether or not the basis for the agreements on which they rest reached the merits. *But unless we can say that they were an adjudication of the merits, the doctrine of collateral estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. . . .* A judgment entered with the consent of the parties may involve a determination of questions and fact and law by the Court. But, unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

Id. at 506 (emphasis added).

The courts recognize that consent judgments will support claim preclusion but not issue preclusion. *International Bldg. Co.*, 345 U.S. at 506; *Avondale*, 786 F.2d at 1272; Restatement (Second) of Judgments, § 27 comment e (1982) (stating that a matter is not actually litigated within the requirement of collateral estoppel if it is the subject of a stipulation between the parties).

The absence of findings and conclusions in Docket 320, and the absence of detailed recitals as to the issues (if any) to be determined, is a critical distinction between the judgment involved there and judgments of the Indian Claims Commission that have been given preclusive effect. *E.g., United States v. Pend Orielle Public Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), *cert. denied*, 429 U.S. 982 (1976). In *Pend Orielle*, the Ninth Circuit cited specified Indian Claims Commission findings when it concluded that the tribe there had been deprived of its entire tract and received no compensation. *Id.* at 1507. Similarly, in *Gemmill*, the Ninth Circuit, again citing specific findings by the Indian Claims Commission, concluded that there had been an uncompensated taking by the United States. *Id.* at 1149.

3.4 *The Special Master's Report and Recommendation Erroneously Assumes That the Boundary Lands Were Ceded.*

A basic assumption in the Special Master's conclusion is that the Quechans ceded their lands and were paid for those lands in Docket 320. However, this basic assumption is wrong, and the Special Master's report bars questions of cession from ever being adjudicated. Barring an adjudication of the Quechan Tribe's rights in disputed boundary lands is particularly unjust when the record shows that the conditions precedent to the Tribe's cession of those lands were never met. The 1893 Agreement was "accepted, ratified and confirmed" by Congress in § 17 of the Act of August 15, 1894, 28 Stat. 286, 335 (1894). Congress required the Colorado River Irrigation Company, to which a right-of-way had been granted the previous year, to

begin construction of the canal required to bring water to the Reservation within three years or forfeit the right-of-way. The Act also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws." *Id.* The 1894 Act was clearly intended to ratify and put into effect the 1893 Agreement.

The 1893 Agreement itself can be summarized as follows.

In Article I, the Quechan Indians, "upon the conditions hereinafter expressed," relinquished all their right, title, claim or interest in the Fort Yuma Reservation.

Article II provided for the allotment of five acres to each individual Indian.

Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unallotted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value.

Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechan Indians with interest at a given percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans.

Article V authorized the Secretary to issue 25-year trust patents to the allottees.

Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws.

Article VII excepted from the operation of the agreement a tract of land, with buildings, to be used as an Indian school. Appendix A.

A condition that each male adult would receive one acre-foot of water per year for growing crops, for a period of ten years was added by the ratifying Act. Act of August 15, 1894 28 Stat. 332.

None of the conditions were ever completed. The canal was never built, the canal company was evicted from the Reservation in 1898, the irrigated lands were never identified, and the non-irrigated lands were never opened to public entry, and no Indian received free water. *See* Opinion of the Solicitor, 86 I.D. 1 (Dec. 20, 1978).

Congress treated the Quechan cession differently from other cessions ratified in the same act. In the 1894 Act, Congress also ratified a series of other reservation cessions. In contrast to the Quechan agreement, each of the other cession agreements specified an unconditional sale and relinquishment of Indian title. Only the Quechan agreement was conditional.

For example, with respect to the agreement covering lands of the Yankton Tribe of South Dakota Indians, Congress approved an agreement whereby the Indians "hereby cede, sell, relinquish, convey to the United States all their claim, right, title and interest . . ." In consideration for such lands ceded, sold, and relinquished, the United States agreed to pay the Yankton Tribe $600,000. 28 Stat. at 290. Congress also ratified an agreement with the Yakima Indians whereby the Indians "hereby cede and relinquish to the United States all their right, title, interest, claim, and demand" in certain lands, and in consideration of the cession, the United States agreed to pay the Yakima Indians $20,000. *Id.* at 320. Similarly, the ratification of an agreement for the Coeur D'Alene Indians provided that the Indians "do hereby cede, grant, and relinquish to the United States all right, title, and claim" to a certain portion of their Reservation, and in exchange the United States agreed to pay the Indians $15,000. *Id.* at 322. Again, with respect to the Siletz

Indians, those Indians agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in all the unallotted lands" of their Reservation and, in exchange, the United States agreed to pay the Indians $242,000 in "cash and in other considerations." Finally, Congress also ratified an agreement with the Nez Perce whereby the Nez Perce Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in the unallotted lands of their Reservation and, in exchange, the United States agreed to pay the sum of $1,626,222.00." *Id.* at 326.

In contrast, the Quechan Indians agreed to surrender and relinquish to the United States all of their right, title, claim, and interest to a portion of their Reservation, but only "upon the conditions hereinafter expressed." No specific and immediate consideration was to be paid to the Quechan Indians as the United States had agreed in the other cession agreements as were ratified on August 15, 1894. Indeed, the only cash-equivalent consideration to be paid to the Quechan Indians for the cession of their land was an uncertain amount of revenue to be derived from the future sale of a portion of the Reservation's irrigable lands.

3.5 *The Special Master's Report Has the Effect of Reinstating the Overruled Solicitor's 1936 Opinion.*

The Special Master's decision in this case ignores this tortured history, and, in effect, without benefit of fact finding or other legal process, reinstates the effects of the overruled Margold opinion of 1936. Before 1936, the Bureau of Indian Affairs' treatment of the boundary lands confirms that the United States did not consider the lands to have been ceded. Before 1936, records of the Tribe and of the United States show a consistent history of administration of the non-irrigable lands by the Bureau of Indian Affairs. This administrative record includes Reservation maps, Bureau of Land Management plat records, sand and gravel leases, and correspondence of the Commission of Indian Affairs and the Director of Reclamation

Service.[32] Such supervision included the execution and management for four decades of Indian permits, Indian rights-of-way, and Indian leases. There exists no record between 1894 and 1936 where the Indian office or the Secretary of the Interior denied approval of a permit, lease, or right-of-way within the non-irrigable lands on the basis that the lands were no longer Indian lands. Nothing in the historical record challenged the jurisdiction of the Bureau of Indian Affairs during this time period.[33]

The 1936 Solicitor's opinion dramatically changed the administration of the boundary lands: It essentially transferred jurisdiction from the Bureau of Indian Affairs to the Bureau of Reclamation. The 1936 opinion operated to immediately terminate a previously uninterrupted pattern of Bureau of Indian Affairs supervision over the non-irrigated lands. More importantly, however, the 1936 opinion also gave the Bureau of Reclamation the green light to build the All-American Canal without the consent of the Quechan Indians.

The events relied on in the 1936 opinion do not support that opinion nor the Special Master's conclusions. Irrigation commenced under the 1904 Reclamation Act does not effect a cession itself nor evidence a cession under the 1893 Agreement. The 1904 Act authorized reclamation lands for the Colorado River Reservation as well as the Fort Yuma Reservation and also includes both Indian and non-Indian lands. That is, irrigation under the 1904 Act was implementing new public reclamation policies, not executing a private contract.

The independence of the 1904 Act from the 1893 Agreement is supported by key differences in the 1894 Act ratifying the

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32. *See* Opinion of the Solicitor, 86 I.D. 1 (1978).

33. While an earlier Solicitor's Opinion, 84 I.D. 1, 20 (1977), took the position that the Bureau of Indian Affairs administration of these lands was inconsistent, that analysis conceded that those federal employees who took the view that the Indians had ceded the non-irrigable lands nevertheless frequently administered the lands as if they were Indian lands.

agreement and 1904 Act. The 1904 Act utilized procedures that were different than those carefully described in the 1893 Agreement. The 1894 Act provided for the United States to bear the cost of surveying and appraising the surplus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5 percent per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must provide for ten years free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction.

In contrast, the 1904 Act was silent about free water. It also credited to the Indians only that portion of the proceeds of sale of surplus irrigable land reflecting the value of the land before reclamation. Otherwise, the surplus irrigable lands were simply opened to settlement under the homestead laws rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Out of the amount the Tribe received under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge under the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians without provision for interest, as contrasted to the 5 percent interest provided in the 1894 Act.

The 1893 Agreement and the 1904 Act make it clear that the failure of conditions undermined the time of performance (a 15-year delay) and, of greater significance, the defect fundamentally rewrote the 1893 Agreement from a pledge to irrigate the best lands for the benefit of the Indians. To the contrary, in the period 1910 through 1920, the Indians received the least desirable lands and continue today to lag behind the non-Indian newcomers who acquired the best Reservation lands from the United States without the "benefit" of a previously

negotiated agreement to irrigate conditioned on the delivery of Colorado River irrigated water to the best lands of the Quechan Indians. That condition did not occur. Failure of the United States to implement the 1893 Agreement means, under the terms of the agreement itself, that both the irrigated and non-irrigated lands were not immediately ceded. That was not the plan for the Fort Yuma Reservation. The plain language of the 1893 Agreement makes it apparent that at Fort Yuma the United States' obligation to pay compensation would not materialize until proceeds from the sale of irrigated lands were received by the United States.

All this is ignored by the Special Master's conclusions. The Tribe must have a chance to present its case on the merits of the status of Reservation boundaries.

4 CONCLUSION.

The Court refused to rule on the nature, extent, and irrigability of the Fort Yuma boundary lands in *Arizona II* because it set aside Special Master Tuttle's findings that the 1978 secretarial order constituted a final determination of the status of the boundary lands. That status still needs to be determined.

In this current proceeding, Special Master McGarr declined to finally determine the status of the boundary lands, instead giving a settlement document in an Indian Claims Commission case (Docket 320) preclusive effect. Yet nothing in the stipulated settlement says anything about Reservation boundaries. It only settles claims and potential claims between the United States and the Tribe. It is clear that the reasoning of the 1978 Solicitor opinion is correct, and that the boundary lands remain in the possession of the United States in trust for the Quechan Tribe and that the Tribe is entitled to an additional allocation of 40,734 acre-feet of water, based on Special Master's Tuttle's finding that 6107 acres of the boundary lands are irrigable.[34]

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34. Report of Special Master Tuttle at 254.

Barring a determination to that effect, the Court should reject the Report and Recommendation of Special Master McGarr and hold that collateral estoppel does not bar the Quechan Tribe from seeking an adjudication of the reservation boundaries and water rights, and remand the matter to the Special Master for trial on the merits.

Respectfully submitted this day 20th of December, 1999.

MASON D. MORISSET
Counsel of Record
K. ALLISON MCGAW
MORISSET, SCHLOSSER, AYER & JOZWIAK
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509
(206) 386-5200

APPENDIX

APPENDIX A — STIPULATION FOR SETTLEMENT AND ENTRY OF FINAL JUDGMENT (INCORPORATES UNITED STATES LETTER OF JULY 27, 1983) DATED AND FILED AUGUST 9, 1983

RAYMOND C. SIMPSON
In Association with
KILPATRICK, CLAYTON, MEYER & MADDEN
2032 Via Visalia
Palos Verdes Estates, CA 90274

Attorneys for Plaintiff

IN THE UNITED STATES COURT OF CLAIMS

DOCKET 320

QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR SETTLEMENT AND ENTRY OF FINAL JUDGMENT

The parties, by counsel, hereby stipulate that the above-entitled claim should be settled, compromised, and finally disposed of by entry of final judgment as follows:

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1. There shall be entered in the action a net judgment, without offsets, for plaintiff in the amount of Fifteen Million Dollars ($15,000,000.00). Entry of final judgment shall finally dispose of all rights, claims, or demands which plaintiff has asserted or could have asserted with respect to the claims in Docket 320, and plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320, and shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which defendant has asserted or could have asserted against plaintiff in Docket 320 and defendant shall be barred thereby from asserting against plaintiff in any future action any such rights, demands, payments on the claim, counterclaims, or offsets.

2. The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case.

3. The final judgment of the United States Claims Court, pursuant to this stipulation, shall constitute a final determination by the court of the above-captioned case and shall become final on the day it is entered, all parties hereto waiving any and all rights to appeal from or otherwise seek review of such final determination.

4. Attached to this stipulation and incorporated by reference are: a resolution approving the settlement adopted by the Quechan Tribal Council, plaintiff's governing body, on June 16, 1983; a resolution adopted at a meeting of the

Appendix A

adult members of the Quechan Tribe of Indians held at Yuma, Arizona, on July 8, 1983; and a further resolution ratifying the action of the members and reaffirming the approval of the settlement by the Quechan Tribal Council adopted July 8, 1983; all of said resolutions authorizing counsel for plaintiff to enter into this stipulation, as set forth herein; and a copy of the letter approving the settlement of this litigation by the Department of the Interior or its authorized representative. (Exhibits 1-4.)

DATED: July 12, 1983.

RAYMOND C. SIMPSON and
KILPATRICK, CLAYTON,
MEYER & MADDEN

By: s/ Raymond C. Simpson
RAYMOND C. SIMPSON
Attorneys of Record for Plaintiff

DATED: July 29, 1983.

F. HENRY HABICHT, II
RICHARD L. BEAL

By: s/ Richard L. Beal
RICHARD L. BEAL
Attorney for Defendant

By: s/ F. Henry Habicht, II
F. HENRY HABICHT, II
Acting Assistant Attorney General
Land and Natural Resources
Division

Appendix A

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Tribal Government Services (AD)

Raymond C. Simpson, Esquire
2032 Via Visalia
Palos Verdes Estates, California 90274

Dear Mr. Simpson:

By letter dated July 11 you requested consideration and approval of a proposed compromise to settle the claims of the Quechan Tribe of Indians in Docket No. 320 for a net final judgment of $15,000,000. This case involves claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978.

The claims in Docket No. 320 are being prosecuted by you under contract No. H50C14207367. This contract was made on February 10, 1971, and duly approved by the Phoenix Area Director. The term of the contract is effective through April 10, 1985.

Pursuant to authority granted to you by the Quechan Tribal Council, you submitted a letter to the Department of Justice offering to settle the claims in Docket No. 320 for $15,000,000. Your offer was accepted by the Acting

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Assistant Attorney General by letter dated July 8, 1983, with conditions. Among the conditions were that the proposed settlement be approved by appropriate resolutions of the governing body and the general membership of the tribe. In addition, approval of the settlement as well as the resolutions of the tribe must be secured from the Secretary of the Interior or his authorized representative.

Entry of judgment in this case shall finally dispose of all claims which the tribe has asserted or which the tribe could have asserted against the defendant under the Indian Claims Commission Act in Docket No. 320.

For purpose of obtaining consideration and approval of the settlement from the general membership of the tribe, a claims settlement meeting was scheduled and held on July 8, 1983, at the Quechan Tribal Office. Prior to the meeting, notices were posted throughout the reservation and mailed to the tribal members.

QUECHAN GENERAL MEMBERSHIP MEETING

On July 8, 1983, the general membership claims settlement meeting was convened at 2:15 p.m. by Vincent Harvier, President, Quechan Tribal Council. Approximately 70 people were in attendance. President Harvier explained to the tribal members the extensive involvement the tribal council has had in the settlement negotiations and his observations of what transpired at a hearing on these claims held the previous month before the United States Claims Court. After some discussion and comments by the tribal council members, you were asked to give your presentation.

You gave a thorough and concise description of the history of the claims and explained the terms of the proposed settlement. Afterwards, Mr. George Bryant, a tribal member, translated the written summary of your explanation into the Quechan language. Those present were then given an opportunity to comment on and ask any questions they may have concerning the settlement. The Bureau observers report that those present at the meeting appeared to understand the nature of the claims and the terms of the proposed settlement.

After some discussion of the settlement, President Harvier read the proposed general membership resolution accepting the terms of the settlement. A motion was made and seconded to adopt the resolution. Quechan General Membership Resolution No. R-34-83 was adopted by a vote of *53 for and 2 opposed, with 4 abstentions.*

We are satisfied that appropriate steps were taken to publicize the Quechan general meeting held on July 8, 1983, so as to afford the tribal members an opportunity to attend the meeting and to consider and vote on the proposed settlement. The general meeting was properly conducted and the votes of the tribal members were fairly taken and reflected the views of the persons who voted. Quechan General Membership Resolution No. R-34-83 is hereby approved.

QUECHAN TRIBAL COUNCIL MEETING

After the general membership meeting, a duly called tribal council meeting was held for the purpose of considering and voting on the proposed settlement. A quorum of the council was present. The Quechan Tribal Council adopted

Resolution No. R-35-83 approving the proposed settlement by a vote of *4 for and none opposed.*

The Quechan Tribe is organized under a constitution and bylaws adopted pursuant to the Indian Reorganization Act. The constitution provides that the Quechan Tribal Council shall represent the Quechan Tribe in all affairs and shall have the power to present and prosecute any claims or demands of the tribe.

Resolution No. R-35-83, enacted on July 8, 1983, by the Quechan Tribal Council constitutes the action of the governing body of the tribe and is hereby approved.

The information furnished to us by you, our field officers, and information from other sources has satisfied us that the proposed settlement of the claims in Docket No. 320 is fair and just. The proposed settlement is hereby approved.

Sincerely,

By: s/ [illegible]
Acting Deputy Assistant Secretary
Indian Affairs (Operations)

APPENDIX B — LETTER OF QUECHAN TRIBAL ATTORNEY REGARDING SETTLEMENT IN DOCKET 320 DATED JULY 6, 1983

LAW OFFICES OF
RAYMOND C. SIMPSON

2032 VIA VISALIA
PALOS VERDES ESTATES, CALIFORNIA 90274
TELEPHONE 373-8592

July 6, 1983

Vincent Harvier
President
QUECHAN TRIBAL COUNCIL
Box 1352
Yuma, AZ 85364

Dear Mr. Harvier:

This letter is written as a summary of recent proceedings in the claim case, Quechan Tribe v. U.S., Docket 320, and of the settlement proposal that has been made, so that you may distribute it to the membership for the meeting of July 8, 1983.

In 1971 the Quechan Tribe retained me to prepare and prosecute claims for reaffirmation of their 1884 title and for damages in Docket 320. First, I was requested to take whatever action was necessary to obtain for the Tribe a reaffirmation of its title to the reservation as established in 1884. Second, I was to pursue the damage claim which the

Quechan Tribe had pending for 20 years against the United States before the Indian Claims Commission, known as Docket 320. As a result, I went to work immediately on both matters, devoting my main efforts, of course, to reaffirming your ownership of the reservation. My efforts were crowned with success in December of 1978, when the Secretary of the Interior issued an order reaffirming that the United States holds title to the lands within the 1884 reservation boundaries in trust for the Quechan Tribe (except those lands to which third parties had acquired title, such as the Bard lands). The decision allowed us to go forward with the claims of the Quechan Tribe for damages for the taking of parts of their reservation after 1893 and the loss of use of other parts of the reservation from 1893 to 1978. At that time I associated Robert J. Kilpatrick with me as counsel for the prosecution of the claims case, and both Mr. Kilpatrick and I have devoted a very large amount of time to the analysis of the case and the preparation of the evidence to prove your damages.

The question we faced at that point was, now that the reservation had been restored, what damages could the Quechans claim? The United States took the position that the Quechans had no damage claim for the lands that had been restored. The United States contended that the only damages owed to the Quechans were for the lands that were not restored, such as the Bard lands and the lands taken for the All-American Canal. When we first talked to the lawyer handling the case for the United States, he valued your damage claim at about $1,000,000.00.

Mr. Kilpatrick and I analyzed the facts and concluded that we could present persuasive evidence that the Quechan

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Tribe sustained damages by the loss of the so-called Bard lands, the lands that were taken for levees, the lands taken for the All-American Canal, and the sand and gravel removed from the reservation. We also developed evidence of loss of rental value from 1893 to 1978 for the restored irrigable farm lands both north and south of the All-American Canal. And we developed evidence of a loss of rental value during the same period for those lands lying along the Colorado River which could and should have been developed for waterfront recreational uses. We therefore concluded that the evidence would support a judgment of at least $8,000,000.00 and at most $25,000,000.00.

We then considered the question of interest, because our appraiser, Robert G. Hill, had advised us that if interest were allowable, the total amount of the claim would exceed $100,000.000.00. We did exhaustive research on the question of interest and concluded, reluctantly, that the law and the court decisions clearly would not allow the Quechan Tribe to recover interest on its claim. Accordingly, the maximum amount we could hope to obtain would be the principal amount we have set forth above.

The United States, of course, strongly resisted our damage claims. It argued that it had no responsibility for "reasonable rental values" and that its liability would be limited to rentals actually collected, which totaled approximately $500,000.00. But as a result of the analysis we made and the evidence we presented to the United States, it subsequently revised its evaluation, first to $4,000,000.00, and then to $8,000,000.00. We rejected these values as inadequate and stated that we were prepared to go to trial.

Appendix B

A trial was set in the matter for June 20, 1983, and a lengthy and thorough pre-trial was held on June 8, 1983, in Washington, D.C. At the pre-trial, we made it clear that we were ready to go to trial, that we had all of our evidence in hand to prove our case, and that we were prepared to prove the damages set forth above. The pre-trial precipitated renewed negotiations, as a result of which we were able to negotiate a settlement with the United States of $15,000,000.00.

We have recommended to the Tribal Council that this settlement be accepted, and the Tribal Council concurs.

In our opinion, the sum of $15,000,000.00 is a fair and reasonable settlement of the claims of the Tribe. The outcome of the trial of any lawsuit is always uncertain. It is possible that a judgment for substantially more than $15,000,000.00 might have been obtained. It is equally possible that the Government's evidence would have been more persuasive and that the amount of the judgment would have been half of $15,000,000.00. I do not want to lay out in this letter any detailed discussion of the weak points in our evidence, but I assure you that there were weaknesses which the United States might and probably would have successfully exploited. And there was a real risk that the ultimate judgment would be much less than the amount of the settlement.

Moreover, if we had gone to trial and obtained a judgment for much more than $15,000,000.00, it is certain that this would have been appealed. That would have meant additional years of waiting with a large uncertainty as to the

ultimate outcome. If the judgment had been reversed, we would have been faced with further trial proceedings.

We were seriously concerned, also, with the consequences of the decision of the United States Supreme Court in Arizona v. California, where the Supreme Court refused to accept the Special Master's recommendation of additional water rights for the Quechan Tribe. The Supreme Court held that there must first be a court decision as to whether the Secretary of the Interior was correct in his 1978 order restoring the 1884 boundaries of the reservation. The United States argued that if the boundary question were decided against the Quechans, the tribe might lose its land and, with it, most of its claimed damages. We opposed the delay and the United States Claims Court refused to delay the trial, but we were gravely concerned that the ultimate outcome of any court decision on boundaries might seriously jeopardize your claims case. We therefore welcomed the opportunity to settle it at this time, thereby avoiding the risks involved in any subsequent litigation over boundaries.

For all of the above reasons it is our opinion that the $15,000,000.00 settlement is fair and reasonable and should be accepted by the Tribe.

Very truly yours,

By: s/ Raymond C. Simpson
RAYMOND C. SIMPSON
RCS: jk

APPENDIX C — 1893 AGREEMENT WITH THE YUMA INDIANS IN CALIFORNIA

SEC. 17. Whereas Washington J. Houston, John A. Gorman, and Peter R. Brady, duly appointed commissioners on the part of the United States, did on the fourth day of December, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Yuma Indians in the State of California, which said agreement is as follows:

"Articles of agreement made and entered into this 4th day of December, A. D. 1893, at Fort Yuma, on what is known as the Yuma Indian Reservation, in the county of San Diego, State of California, by Washington J. Houston, John A. Gorman, and Peter R. Brady, commissioners on the part of the United States appointed for the purpose, and the Yuma Indians.

ARTICLE I.

"The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows:

" 'Beginning at a point in the middle of the channel of the Colorado River, due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west on the line between sections nineteen and thirty to the range

line, between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sisteen south, range twenty-one east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: PROVIDED, HOWEVER, That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

" 'It is also hereby ordered that the Fort Yuma military reservation be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes.' "

ARTICLE II.

"Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in adjoining sections five acres of land, which shall be allotted to such Indian in severalty. Each member of said band of Indians over the age of eighteen years shall be entitled to select his or her land, and the father, or, if he be dead, the mother, shall select the land herein provided for for each of his or her children who may be under the age of eighteen years; and if both father and mother of the child under the age of eighteen years shall be dead, then the nearest of kin over the age of eighteen years shall select and locate his or her land; or if such persons shall be without kindred, as aforesaid, then the Commissioner of Indian Affairs, or some one by him authorized, shall select and locate the land of such child.

ARTICLE III.

"That the allotments provided for in this agreement shall be made, at the cost of the United States, by a special agent appointed by the Secretary of the Interior for the purpose, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and within sixty days after such special agent shall appear upon said reservation and give notice to the said Indians that he is ready to make such allotments; and if anyone entitled to an allotment hereunder shall fail to make his or her selection within said period of sixty days then such special agent shall proceed at once to make such selection for such person or persons, which shall have the same effect as if made by the

person so entitled; and when all of said allotments are made and approved, then all of the residue of said reservation which may be subject to irrigation except as hereinafter stated, shall be disposed of as follows: The Secretary of the Interior shall cause the said lands to be regularly surveyed and to be subdivided into tracts of ten acres each, and shall cause the said lands to be appraised by a board of three appraisers, composed of an Indian inspector, a special Indian Agent, and the agent in charge of the Yuma Indians, who shall appraise said lands, tracts, or subdivisions, and each of them, and report their proceedings to the Secretary of the Interior for his action thereon; and when the appraisement has been approved the Secretary of the Interior shall cause the said lands to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof, first having given at least sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers of general circulation; and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders then the Secretary of the Interior may sell the same at private sale at not less than the appraised value.

ARTICLE IV.

"That the money realized by the sale of the aforesaid lands shall be placed in the Treasury of the United States, to the credit of the said Yuma Indians, and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress, or to application,

by order of the President, for the payment of water rents, building of levees, irrigating ditches, laterals, the erection and repair of buildings, purchase of tools, farming implements and seeds, and for the education and civilization of said Yuma Indians.

ARTICLE V.

"Upon the approval of the allotments provided for herein by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patent shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his or her decease, to his or her heirs or devisees, according to the laws of California, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs or devisees as aforesaid in fee, discharged of said trust and free of all incumbrance whatsoever.

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. And during said period of twenty-five years these allotments and improvements thereon shall not be subject to taxation for any purpose, nor subject to be seized upon any execution or other legal process, and the law of descent and partition in force in California shall apply thereto.

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ARTICLE VI.

"All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States.

ARTICLE VII.

"There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section, or three hundred and twenty acres.

ARTICLE VIII.

"This agreement shall be in force from and after its approval by the Congress of the United States.

"In witness whereof we have hereunto set our hands and seals the day and year first above written.

WASHINGTON J. HOUSTON, (SEAL.)
JOHN A. GORMAN, (SEAL.)
PETER R. BRADY, (SEAL.)

Commissioners on the part of the
United States.

Appendix C

BILL MOJAVE, and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of making the allotments provided for in said agreement, including the payment and expenses of the necessary special agent hereby authorized to be appointed by the Secretary of the Interior, and for the necessary resurveys, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of two thousand dollars, or so much thereof as may be necessary.

That for the purpose of defraying the expenses of the survey and sale of the lands by said agreement relinquished and to be appraised and sold for the benefit of said Indians, the sum of three thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the same to be reimbursed to the United States out of the proceeds of the sale of said lands.

That the right of way through the said Yuma Indian Reservation is hereby granted to the Southern Pacific Railroad Company for its line of railroad as at present constructed, of the same width, with the same rights and privileges, and subject to the limitations, restrictions, and

conditions as were granted to the said company by the twenty-third section of the Act approved March third, eighteen hundred and seventy-one, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes:" PROVIDED, That said company shall, within ninety days from the passage of this Act, file with the Secretary of the Interior a map of said right of way, together with a relinquishment by said company of its right of way through said reservation as shown by maps of definite location approved January thirty-one, eighteen hundred and seventy-eight.

The Secretary of the Interior is hereby authorized and directed to cause all the lands ceded by said agreement which may be susceptible of irrigation, after said allotments have been made and approved, and said lands have been surveyed and appraised, and the appraisal approved, to be sold at public sale, by the officers of the land office in the district wherein said lands are situated, to the highest bidder for cash, at not less than the appraised value thereof, after first having given at least sixty days' public notice of the time, place, and terms of sale immediately prior to such sale, by publication in at least two newspapers of general circulation, and any lands or subdivisions remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior, and if not sold at such second offering for want of bidders, then the Secretary may cause the same to be sold at private sale at not less than the appraised value. The money realized from the sale of said lands, after deducting the expenses of the sale of said lands, and the other money for which provision is made for the

reimbursement of the United States, shall be placed in the Treasury of the United States to the credit of said Yuma Indians, and shall draw interest at the rate of five per centum per annum, and said principal and interest shall be subject to appropriation by Congress, or to application by the President of the United States for the payment of water rents, the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements and seeds, and for the education and civilization of said Indians: PROVIDED, HOWEVER, That none of said money realized from the sale of said lands, or any of the interest thereon, shall be applied to the payment of any judgment that has been or may hereafter be rendered on claims for damages because of depredations committed by said Indians prior to the date of the agreement herein ratified.

That all the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws.

That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act aforesaid shall be forfeited.

Appendix C

That the Secretary of the Interior shall have authority from time to time to fix the rate of water rents to be paid by the said Indians for all domestic, agricultural, and irrigation purposes, and in addition thereto each male adult Indian of the Yuma tribe shall be granted water for one acre of the land which shall be allotted to him, if he utilizes the same in growing crops, free of all rent charges during the period of ten years, to be computed from the date when said irrigation company begins the delivery of water on said reservation.

* * *

Approved, August 15, 1894. (28 Stat. 332) 1 Kappler 542-545

Pre-Trial Item 693

* * * *

APPENDIX D — LOCATOR MAP 1

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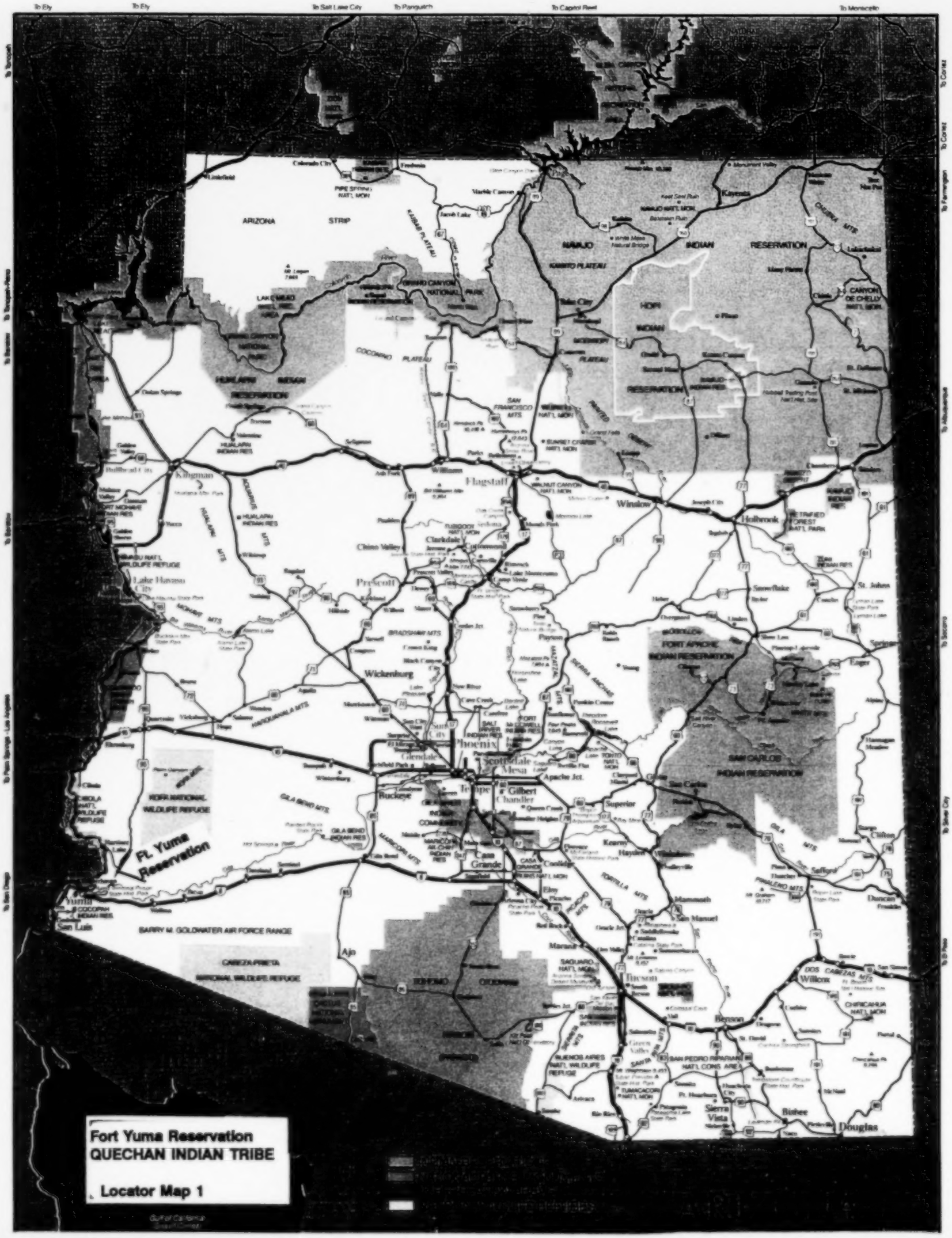
To Ely
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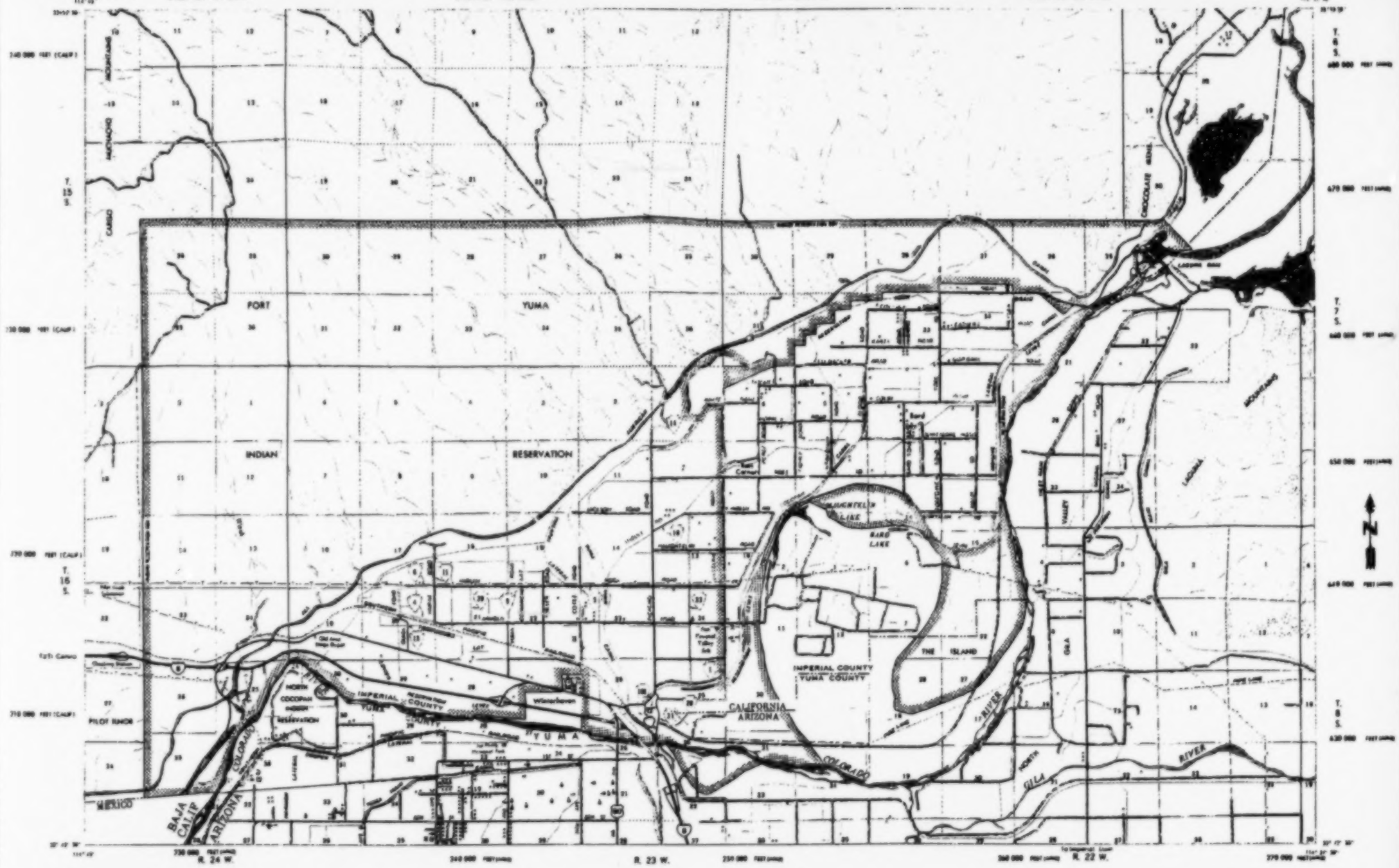
To Winslow
To Gallup
To Albuquerque
To Socorro
To Show Low
To El Paso
To San Diego
To Palm Springs - Los Angeles
ARIZONA
STRIP
GRAND CANYON NATIONAL PARK
COCONINO PLATEAU
HUALAPAI INDIAN RESERVATION
HUALAPAI INDIAN RES
HUALAPAI MTS
AQUARIUS MTS
KAIBAB PLATEAU
NAVAJO INDIAN RESERVATION
NAVAJO NATL MON
KAIBITO PLATEAU
MONUMENT PLATEAU
HOPI INDIAN RESERVATION
PAINTED DESERT
CHUSKA MTS
CANYON DE CHELLY NATL MON
PETRIFIED FOREST NATL PARK
SAN FRANCISCO MTS
WUPATKI NATL MON
SUNSET CRATER NATL MON
WALNUT CANYON NATL MON
FORT APACHE INDIAN RESERVATION
SAN CARLOS INDIAN RESERVATION
PINALENO MTS
GILA MTS
MAZATZAL MTS
SIERRA ANCHA MTS
BRADSHAW MTS
HARCUVAR MTS
HARQUAHALA MTS
GILA BEND MTS
GILA BEND INDIAN RES
MARICOPA MTS
MARICOPA INDIAN RES
SALT RIVER INDIAN RES
FORT McDOWELL INDIAN RES
TONTO NATL MON
CASA GRANDE NATL MON
SAGUARO NATL MON
ORGAN PIPE CACTUS NATL MONUMENT
BARRY M. GOLDWATER AIR FORCE RANGE
CABEZA PRIETA NATIONAL WILDLIFE REFUGE
KOFA NATIONAL WILDLIFE REFUGE
CIBOLA NATL WILDLIFE REFUGE
BUENOS AIRES NATL WILDLIFE REFUGE
SAN PEDRO RIPARIAN NATL CONS AREA
DOS CABEZAS MTS
CHIRICAHUA NATL MON
CHIRICAHUA MTS
PINALENO MTS
Fort Yuma Reservation
Kingman
Lake Havasu City
Prescott
Wickenburg
Phoenix
Glendale
Scottsdale
Mesa
Tempe
Gilbert
Chandler
Buckeye
Casa Grande
Eloy
Maricopa
Ajo
Yuma
San Luis
Flagstaff
Williams
Winslow
Holbrook
Show Low
Globe
Miami
Superior
Kearny
Hayden
Clifton
Safford
Duncan
Mammoth
San Manuel
Tucson
Willcox
Benson
Sierra Vista
Bisbee
Douglas
Colorado City
Fredonia
Marble Canyon
Jacob Lake
Page
Kayenta
Monument Valley
Tuba City
Chinle
Many Farms
Lukachukai
Window Rock
St. Michaels
Ganado
Keams Canyon
Second Mesa
Polacca
Winslow
Joseph City
Heber
Overgaard
Show Low
Snowflake
Taylor
Pinetop-Lakeside
Springerville
Eagar
St. Johns
Concho
Vernon
Sanders
Navajo
Ramah
Zuni
Gallup
Grants
Thoreau
Crownpoint
Window Rock
Chambers
Holbrook
Petrified Forest
Joseph City
Winslow
Flagstaff
Williams
Ash Fork
Seligman
Kingman
Hackberry
Peach Springs
Valentine
Truxton
Yucca
Topock
Needles
Parker
Bouse
Quartzsite
Wenden
Salome
Aguila
Morristown
Wickenburg
Congress
Yarnell
Prescott
Prescott Valley
Chino Valley
Paulden
Ashfork
Jerome
Cottonwood
Clarkdale
Sedona
Camp Verde
Cornville
Lake Montezuma
Rimrock
Payson
Pine
Strawberry
Tonto Basin
Roosevelt
Globe
Miami
Superior
Kearny
Hayden
Winkelman
Oracle
Oracle Jct.
Catalina
Tortilla Jct.
Picacho
Red Rock
Marana
Tucson
Benson
Tombstone
Bisbee
Douglas
Sierra Vista
Huachuca City
Ft. Huachuca
Patagonia
Nogales
Rio Rico
Amado
Green Valley
Sahuarita
Three Points
Why
Ajo
Gila Bend
Buckeye
Avondale
Litchfield Park
Goodyear
Tolleson
Wittmann
Surprise
Sun City
Youngtown
El Mirage
Glendale
Peoria
Scottsdale
Mesa
Tempe
Apache Jct.
Gilbert
Chandler
Queen Creek
Higley
Coolidge
Florence
Florence Jct.
Kearny
Hayden
Winkelman
Superior
Miami
Globe
Claypool
Show Low
Snowflake
Taylor
Pinetop-Lakeside
Heber
Overgaard
Forest Lakes
Munds Park
Sedona
Oak Creek Canyon

APPENDIX E — LOCATOR MAP 2



Fort Yuma Reservation
QUECHAN INDIAN TRIBE

Locator Map 2

FORT YUMA INDIAN RESERVATION
IMPERIAL COUNTY, CALIFORNIA & YUMA COUNTY, ARIZONA

KEY TO SHEETS

FORT YUMA INDIAN AGENCY, CALIFORNIA
U.S. DEPARTMENT OF THE INTERIOR

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1981